

Before the
COPYRIGHT ROYALTY BOARD
United States Copyright Office
Washington, DC

In re

Distribution of Digital Audio Recording
Royalty Funds

CONSOLIDATED
Docket No. 2008-3 CRB DD
(2007-2011 SRF)

**MOTION TO DISMISS CGN’S CLAIM TO ANY PORTION OF THE
2007-2011 DART SOUND RECORDINGS FUND COPYRIGHT OWNERS SUBFUND**

The Alliance of Artists and Recording Companies, Inc. (“AARC”), on its behalf and that of its Participants,¹ hereby moves to dismiss “circle god network inc d/b/a david powell” (“CGN”)²’s claim to any portion of the 2007³ Digital Audio Recording Technologies (“DART”) Sound Recordings Fund Copyright Owners Subfund (“SRF/CO Subfund”) royalties for failure to properly file a written direct statement, as required by 37 C.F.R. § 351.4, and for failure to provide any supporting evidence of the copyright ownership of any sound recordings with 2007 sales. See 37 C.F.R. § 351.4 (2019). Also, CGN’s filing should be rejected on the ground that David Powell is not a licensed attorney and thus ineligible to represent CGN, a corporate entity, in a proceeding. See 37 C.F.R. § 303.2 (2019).

¹ AARC represents tens of thousands of featured recording artists and sound recording copyright owners (“AARC Participants”), with combined repertoires of millions of sound recordings and billions of sales. AARC, a non-profit organization formed to administer DART royalties, is the leading common agent representing the interests of featured recording artists and sound recording copyright owners in DART royalty proceedings. AARC currently represents over 440,000 featured recording artists and over 16,000 labels. AARC has filed valid claims to the 2007, 2008 and 2010 SRF/CO Subfunds at issue and represents all the 2007-2011 DART SRF/CO parties except for two non-settling parties.

² On the eCBR system, a party “David Powell” was listed as withdrawn and substituted with a party “circle god network inc d/b/a david powell.” All the filings by this party were signed by David Powell, pro se.

³ Even though CGN claimed “5% Dart Funds for each year (2007-2011)” in its filing, the CRB Judges have recognized that David Powell only filed a claim for the 2007 SRF/CO Subfund and for no other years or funds. Therefore, CGN/David Powell is not eligible to claim DART funds for any years other than the 2007 royalty year. Order Granting Motion of David Powell to Accept Late Petition to Participate, *In re* Distribution of Digital Audio Recording Royalty Funds n.3, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (June 19, 2019).

I. BACKGROUND OF THIS PROCEEDING

On December 26, 2018, the Copyright Royalty Board (“CRB”) announced the consolidation of five proceedings to distribute the remaining royalties in the 2007-2011 DART Sound Recordings Funds (“SRF”). See Notice announcing commencement of proceeding with request for Petitions to Participate, *In re* Distribution of the 2007, 2008, 2009, 2010, and 2011 Digital Audio Recording Technology Royalty Funds for the Sound Recordings Funds, 83 Fed. Reg. 66,312 (Dec. 26, 2018) (“2007-2011 Notice”). The 2007-2011 Notice also set January 15, 2019, as the due date for interested copyright parties to file Petitions to Participate (“PTP”) with any applicable filing fees. Id.

AARC complied with the 2007-2011 Notice by filing its PTP along with the one hundred and fifty dollars (\$150) filing fee on January 25, 2019. Petition to Participate, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (Jan. 25, 2019).

CGN’s initial petition was rejected by the CRB on February 27, 2019. Order Granting AARC Motion to Reject David Powell’s Defective Filing and Dismissing David Powell, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Feb. 27, 2019). However, its late PTP was later accepted by the CRB. Motion for Leave to File a Late Petition to Participate ss.351.1(d) Petition to Participate in the DART Proceedings 2007-2011 SRF Legal Discussion Statutes and Regulations, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (June 24, 2019).

The CRB also set October 3, 2019, as the due date for the parties to file written direct statements. Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, *In re* Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Feb. 27, 2019) (“Scheduling Order”).

As required by 37 C.F.R. § 303.5, AARC properly and timely filed its written direct statement through eCRB on October 3, 2019, with a copy of all testimonies, exhibits and appendices in support of its claim to the one hundred percent (100%) share of the remaining 2007 DART SRF/CO Subfund. See 37 C.F.R. § 303.5 (2019); see also Direct Case of Alliance of Artists and Recording Companies, Inc., *In re* Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Oct. 3, 2019) (“AARC Direct Case”).

AARC Direct Case automatically satisfied the delivery requirement set forth in 37 C.F.R. § 303.6, because CGN, as explained below, also used the eCRB system to file its documents. 37 C.F.R. § 303.6(h)(1) (2019) (“Electronic filing of any document through eCRB operates to effect delivery of the document to [participants] who have obtained eCRB passwords, and the automatic notice of filing sent by eCRB to the filer constitutes proof of delivery.”); see also Scheduling Order n.3 (“Unless the Judges order otherwise, all participants shall file electronically using eCRB and shall receive relevant documents electronically through eCRB.”).

CGN filed a two-page document, with none of the required elements of a written direct statement, through eCRB on September 26, 2019. [I]ntroduction memorandum to the written direct case of circle god network inc. (members) d/b/a David powell, *In re* Distribution of Digital

Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Sept. 26, 2019) (“CGN Filing”). To be specific, CGN did not include any testimony or exhibits as required by section 351.4. See CGN Filing at 2; see also 37 C.F.R. § 351.4.

II. REASONS FOR THE DISMISSAL OF CGN’S CLAIM TO ANY PORTION OF THE 2007-2011 DART SRF COPYRIGHT OWNERS SUBFUNDS

CGN’s claim to any portion of the 2007 DART SRF/CO Subfund should be dismissed based on its failure to comply with the CRB’s regulations to file a written direct statement with the requisite testimony and exhibits supporting its claim. See 37 C.F.R. § 351.4. By failing to do so, CGN provided no plausible fact in support of its claim to the share of 2007 DART SRF/CO Subfund, and therefore, CGN should be dismissed from this proceeding. Id.

Additionally, CGN’s claim should be dismissed and its filings rejected on the ground that David Powell cannot represent CGN, which is not an “[i]ndividual part[y],” because David Powell has not established for the record that he is a licensed attorney. See 37 C.F.R. §§ 303.2; 303.6(e). David Powell has signed the filings as “pro se,”⁴ thereby conceding that he is not an attorney.

A. CGN Has Failed to Properly File a Written Direct Statement with the CRB.

CGN Filing is facially deficient because it fails to include the statutorily requisite content, any testimony or exhibits, to support its claim to the share of the 2007 DART SRF/CO Subfund. Accordingly, its filing is a violation of section 351.4 and therefore should be dismissed. 37 C.F.R. § 351.4.

⁴ “For himself; in his own behalf; in person.” PRO SE, Free Law Dictionary, <https://www.freelawdictionary.org/?s=pro+se> (last visited Oct. 15, 2019).

As required by section 351.4, a written direct statement “shall include all testimony, including each witness’s background and qualifications, along with all the exhibits.” 37 C.F.R. § 351.4. The CRB has addressed the issue of written direct statement content in the past. In a prior DART SRF/CO Subfund distribution proceeding, the CRB found that a filing submitted as a written direct statement, which included no testimony or exhibits, was “facially deficient” and warranted dismissal of the filing party’s claim. See Order Granting AARC’s Motion to Dismiss Edward Whitney Mazique’s Claims to the Remaining 2% of the 2005 and 2006 Sound Recordings Funds at 2, In the Matter of Distribution of the 2005 and 2006 Digital Audio Recording Royalty Funds, Docket No. 2009-4 CRB DD 2005-2006 (Aug. 26, 2010).

In the instant case, CGN Filing did not qualify as a written direct case because it failed to provide testimonies or exhibits as required by the statute. In fact, CGN conceded that this filing “contains no written direct testimony of CGN INC.’s witnesses and or exhibits.” CGN Filing at 1. Therefore, the CGN Filing should be deemed as “facially deficient.” Accordingly, CGN did not meet the statutory requirement of written direct statements and its claim should be dismissed.

B. By Failing to Include Any Testimony or Exhibits, CGN Has Failed to Provide Factual Evidence Supporting Its Claim to the 2007 DART SRF/CO Subfund.

CGN is entitled to zero (0) DART SRF royalties for the 2007 royalty year. See AARC Direct Case at 11. There were no 2007 sales records reported by the Nielsen SoundScan Sales Data (“SoundScan Data”)⁵ of any sound recordings, for which CGN owns the exclusive right to

⁵ “Nielsen is the authority in tracking what music people are buying both in-store and digitally. Nielsen compiles data from more than 39,000 retail outlets globally, to help record labels, publishers, artists, artist management and performance rights organizations understand what albums, singles and music videos people are buying, and where they’re buying them.” This sound recording unit sales data, the “SoundScan Data,” is collected as follows: “[o]n a weekly basis, Nielsen collects point-of-sale (POS) data in 19 countries across the U.S., Canada, Europe and

reproduce the sound recording during the 2007 royalty year. See id. at 9-10. Therefore, CGN's claim to the 2007 DART SRF/CO Subfund must be dismissed.

Section 803 of the Copyright Act demonstrates that the term "written direct statements" means the information that is necessary to establish the distribution of royalty payments. 17 U.S.C. § 803(b)(6)(C)(ii) (2016). To be more specific, the Audio Home Recording Act ("AHRA") restricts the distribution of DART royalties to an "interested copyright party," "based on the extent to which, during the relevant period – (1) for the Sound Recordings Fund, each sound recording was **distributed** in the form of digital musical recordings" 17 U.S.C. §§ 1001(7), 1006(a), (c)(1) (2016) (emphasis added); see also 17 U.S.C. § 1001(6) ("Distribute" means to sell, lease, or assign. . . ."). Also, an "interested copyright party" is defined as a party that meets one of four statutory criteria set forth in 17 U.S.C. § 1001(7). 17 U.S.C. § 1001(7).

The CRB has previously addressed the importance of providing factual evidence of sales in a written direct statement. In the 2013 DART SRF distribution proceeding, the CRB dismissed a party's claim to DART SRF royalty funds because the party's written direct statement contained no factual evidence of sales during the royalty year. The CRB, therefore concluded that the written direct statement failed to establish the party's right to any portion of the funds. See Determination and Order at 2, *In re* Distribution of 2013 Digital Audio Recording Royalty Funds, Docket No. 14-CRB-0006 DART SR (CO/FA) (2013) (Mar. 24, 2016) ("2013

Oceania. In the U.S. and Canada, physical and digital titles from venues, mass merchants, retail chains, independent record stores and digital download providers can be viewed by UPC, ISRC, artist, market, retailer type or genre." AARC Direct Case, Music Sales Measurement, Nielson, <https://www.nielsen.com/us/en/solutions/measurement/music-sales-measurement.html> (last visited on Sept. 24, 2019), Ex. A.

DART SRF Determination”) (finding that “factual evidence” of sales is required to “establish a right to any of the funds,” and failure to provide such evidence results in denial of any claim to the 2013 DART SRF).

Since CGN did not include any testimony or exhibits in its written direct statement, it provided no proof of its entitlement to any portion of the 2007 DART SRF/CO Subfund. See CGN Filing at 2.

Moreover, AARC’s search of the title, “Liberation Movement,” listed in CGN’s 2007 claim to the 2007 DART SRF/CO Subfund, substantiates its conclusion that “Liberation Movement” is not a musical sound recording at all and, so, no sales were reported in the 2007 SoundScan Data. See AARC Direct Case Stern Testimony ¶¶ 30-41. Notably, AARC’s search of the United States Copyright Office Public Catalog⁶ for any works registered by CGN or David Powell uncovered two copyright registrations: one of an “unpublished sound recording,” and the other of an “unpublished text.” See AARC Direct Case Stern Testimony ¶¶ 37-39; see also U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 2306.4 (3d ed. 2017).

An unpublished sound recording or text by its very nature has not been distributed to the public by sale or other means, and therefore, does not satisfy the AHRA distribution requirement. See 17 U.S.C. § 101 (2016) (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership. . . .”); see also 17 U.S.C. § 1001(6) (“‘Distribute’ means to sell, lease, or assign. . . .”). Furthermore, texts are not covered under the

⁶ It is well-settled that a copyright registration constitutes prima facie evidence of ownership. 17 U.S.C. § 410(c) (2016).

AHRA. See 17 U.S.C. § 1006(a)(1). Most importantly, AARC’s search in the SoundScan Data found no sales for the title “Liberation Movement,” or any other CGN titles during the 2007 royalty year. See AARC Direct Case Stern Testimony ¶¶ 30-34.

Additionally, AARC found no other titles claimed by CGN that might serve as a basis for CGN’s claim to the DART SRF/CO Subfund. See AARC Direct Case Stern Testimony ¶¶ 40-41. Accordingly, CGN provided no factual basis, nor does there appear to be one, for its claim to any portion of the 2007 DART SRF/CO Subfund, and therefore its claim should be dismissed.

C. David Powell Cannot Represent the Corporate Entity “Circle God Network, Inc.” in this Proceeding Because He Is Not an Attorney.

In addition to failing to comply with the statutory content requirement for a written direct statement and provide a factual basis for its claim to the 2007 DART SRF/CO Subfund royalties, CGN also failed the representation requirement set forth in 37 C.F.R. § 303.2. See 37 C.F.R. § 303.2.

Section 303.2 provides that “[i]ndividual parties in proceedings before the Judges may represent themselves or be represented by an attorney. All other parties must be represented by an attorney. . . .” Id. The CRB has previously addressed this issue. In the 2013 DART SRF distribution proceeding, the CRB dismissed the portion of a party’s PTP relating to a company entity on the ground that the individual filing it “[was] not an attorney and thus ineligible to represent a corporate entity in a proceeding.” See 2013 DART SRF Determination at 2 (“As Mr. Curry is not an attorney [and thus ineligible to represent a corporate entity in a proceeding, see 37 C.F.R. § 350.2], the Judges dismissed the portion of his PTP relating to TAJAI.”).

According to the record, David Powell is not an attorney. Section 303.6 requires that a pleading filed by an attorney must “list the attorney’s full name . . . and a state bar identification number.” See 37 C.F.R. § 303.6(e). None of CGN’s filings in this proceeding satisfied this requirement. Moreover, CGN’s filings concede that David Powell is not an attorney, which is evidenced by the fact that all filings state that they are filed “pro se.” See e.g., CGN Filing at 1.

The instant case is also different from the 2013 DART SRF distribution proceeding, where a party filed the PTP partially on behalf of himself and partially on behalf of a corporate entity. Finding that the party was not an attorney and thus could not represent a corporate entity, the CRB dismissed the portion of his PTP related to the corporate entity. See 2013 DART Determination at 2. Here, all CGN’s filings were filed by David Powell solely on behalf of CGN, a corporate entity. See e.g., CGN Filing at 1. Since David Powell is not an attorney and thus cannot represent a corporate entity, the CGN Filing should be dismissed as a whole.

III. CONCLUSION

For all the foregoing reasons, AARC respectfully requests the dismissal of CGN’s claim for any portion of the 2007 DART SRF/CO Subfund. AARC has satisfied all the statutory, regulatory, and the CRB ordered requirements. CGN, on the other hand, has repeatedly neglected the DART procedural requirements. Most importantly, CGN failed to file a written direct statement containing all requisite content by the due date. Its filing does not qualify as a written direct statement. CGN is also represented by an individual that is not an attorney in violation of the CRB’s requirements.

WHEREFORE, in view of the foregoing, AARC respectfully requests the dismissal of

CGN's claim to any portion of the 2007 DART SRF/CO Subfund and distribution of 100% of the remaining royalties to AARC.

Respectfully submitted,
On Behalf of AARC

/s/Linda R. Bocchi, Esq.

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October 28, 2019

Proof of Delivery

I hereby certify that on Monday, October 28, 2019, I provided a true and correct copy of the Motion to Dismiss CGN's Claim to Any Portion of the 2007-2011 DART Sound Recordings Fund Copyright Owners Subfund to the following:

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Curry, Eugene, represented by Eugene Curry Mr., served via Electronic Service at lambchopsmusic@voicenet.com

Signed: /s/ Linda R Bocchi